

Before the  
**COPYRIGHT ROYALTY BOARD**  
**LIBRARY OF CONGRESS**  
**UNITED STATES COPYRIGHT OFFICE**  
Washington, D.C.

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In the Matter of )

)  
Digital Performance Right in Sound )  
Recordings and Ephemeral Recordings )  
\_\_\_\_\_)

Copyright Royalty Board

Docket No. 2005-1 CRB DTRA

**ROYALTY LOGIC, INC.'S REPLY TO SOUNDEXCHANGE'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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**RLI'S REPLY TO SOUNDEXCHANGE'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

**I. INTRODUCTION**

1. The Librarian has stated that the objective of the collection and distribution of royalties under the Statutory Licenses is "to make prompt, efficient and fair payment to Copyright Owners and Performers with a minimum of expense."<sup>1</sup> SoundExchange and Royalty Logic, Inc. ("RLI") have two very different approaches for how those policy goals can best be achieved.

2. SoundExchange believes that these objectives could be achieved through the establishment of SoundExchange as a national monopoly for the collection and distribution of statutory royalties. But, nowhere in its proposed findings does SoundExchange cite to any statutory authority or legislative intent that supports a national monopoly on royalty collection and distribution services.

3. RLI believes that the best way to achieve these objectives is a system where both RLI and SoundExchange co-exist, operating on the same basis and competing for the representation of copyright owners and performers on the basis of administrative cost and service. The RLI Affiliates cite specific statutory authority and legislative intent supporting competition in collective licensing as the best way to achieve the Librarian's stated policy objectives of fair, prompt and efficient administration of these statutory royalties.

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<sup>1</sup> *Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule, 67 Fed. Reg. 45239, 45266 (July 8, 2002) ("Webcasters I Librarian's Decision")

4. The RLI Affiliates seek the designation of RLI as a "Designated Agent" on the same basis as SoundExchange, with both collectives receiving Direct, Accounting, Payment, Reporting, and Audit rights from the Services – herein "DARPA."

**II. SOUNDEXCHANGE AND RLI SYSTEMS AND PROCESSES ARE SIMILAR – BUT, SOUNDEXCHANGE CANNOT CITE ITS OWN COMPUTER SYSTEM INADEQUACIES AS A REASON FOR A NATIONAL MONOPOLY**

5. Paragraphs 1508 – 1535 and other paragraphs sprinkled throughout SoundExchange's Proposed Findings of Fact and Conclusions of Law (herein "SX-PPFCL"), refer to its internal computer systems and processes for collection and distribution of royalties. Indeed Ms. Kessler describes systems and processes common to all music royalty processing systems. RLI has not disputed SoundExchange's systems, processes or capability to do what it says it can do. RLI merely has stated that it has access to data, systems and processes that do the same thing, not only for sound recordings, but for musical works as well.<sup>2</sup> And, because those systems were created for another purpose, RLI did not incur the same start up costs as SoundExchange.<sup>3</sup> SoundExchange did not present any evidence challenging RLI's access to such data and systems nor RLI's technical capacity to administer the collection and distribution of royalties under the statutory licenses.

6. SoundExchange does claim that it would incur "significant costs in revamping and retrofitting systems" in order to keep track of the affiliation of individual copyright owners and performers in a two agent model.<sup>4</sup> However, the ability to track affiliation of royalty recipients is a basic requirement of any music copyright royalty administration system. Mr. Gertz, citing as an example the practical reality that the

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<sup>2</sup> Gertz Tr. Vol. 18, 22:15 – 24:18; 36:11-14; 51:15-22

<sup>3</sup> Gertz Tr. Vol. 18, 312:12-17.

owner of the Rolling Stones Masters designated RLI for U.S. performing rights collections but the PPL for U.K. collections, stated: "Any copyright [royalty] system has to be able to identify multiple collectives which a copyright owner or [other] royalty participant...might affiliate with, especially multiple collectives on a territory-by-territory basis."<sup>5</sup> SoundExchange's failure to anticipate and program for common royalty system requirements cannot be used as a reason to foreclose competition – especially where SoundExchange touts for its bona fides, its activities in foreign royalty collection. SoundExchange will have to make these changes to their systems whether there is competition from RLI or not. Furthermore, Mr. Gertz testified that it should not be difficult to modify software to add the ability to track individual affiliations.<sup>6</sup>

### **III. SOUNDEXCHANGE CANNOT BOOTSTRAP THE LIBRARIAN'S RATIONALE, IN WEBCASTER I, FOR PAYMENT TO UNAFFILIATED ROYALTY RECIPIENTS, INTO A NATIONAL MONOPOLY**

7. The Librarian's rationale in Webcaster I<sup>7</sup> for assigning responsibility to SoundExchange for the small subset of copyright owners and performers that have not designated either SoundExchange or RLI cannot be bootstrapped into a rationale for a SoundExchange national monopoly.<sup>8</sup> In Webcaster I, the Librarian recognized that any Copyright Owner or Performer could freely choose to designate RLI as a Designated Agent.<sup>9</sup>

8. However, there remained a very narrow issue as to which of the two Designated Agents (i.e., SoundExchange or RLI) would distribute funds to Copyright

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<sup>4</sup> SX-PPFCL at ¶¶ 1542 – 1544.

<sup>5</sup> Gertz Tr. Vol 18, at 98:6-99:6.

<sup>6</sup> Gertz Tr. Vol. 18, at 99:13-100:1.

<sup>7</sup> *Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings*, Final Rule, 67 Fed. Reg. 45239, 45266 (July 8, 2002) ("Webcasters I Librarian's Decision")

<sup>8</sup> See, SX-PPFCL ¶¶1547,1558,1565,1588,1606,1621,1632.

Owners who failed to make an election. In Webcaster I, the Librarian refused to allow SoundExchange to deduct costs beyond the costs of collection and distribution of royalties, even though SoundExchange argued for the right to deduct other licensing and litigation costs. With cost deductions so limited, the Librarian named SoundExchange as the Designated Agent to distribute funds to Copyright Owners who failed to expressly designate either SoundExchange or RLI as their agent to receive and distribute royalties on their behalf. The Librarian confirmed this decision in part because the AFM and AFTRA, which represent artists who are among the beneficiaries of the license, expressed a strong preference for the designation of SoundExchange as the agent for this small subset of royalty recipients and because SoundExchange was to become a non-profit organization – thereby assuring that only the bare minimum of costs relating only to the collection and distribution would be deducted from the royalties due those who had not made an election.<sup>10</sup>

9. However, this rationale, adopted before the enactment of Section 114(g)(3), is no longer persuasive. SoundExchange may now deduct a “laundry list” of costs previously disallowed by the Librarian.<sup>11</sup> Congress recognized the Register’s concern that, in fairness, a nonprofit agent should not be allowed to deduct such costs, without the specific authorization from those whose royalties would be diminished.

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<sup>9</sup> “Of course, any Copyright Owner or Performer can affirmatively choose RLI to act on its behalf as a Designated Agent.” Webcaster I Librarian’s Decision at 45268.

<sup>10</sup> “Performers believe that SoundExchange will make fair and equitable distributions and not deduct additional costs beyond those necessary costs incurred to effectuate a distribution.” Also, “SoundExchange is a nonprofit organization so that no copyright owner’s or artist’s royalty share will be diminished by anything other than necessary distribution costs...” Webcaster I Librarian’s Decision at 45267.

<sup>11</sup> See, RLI’s Proposed Findings of Fact and Conclusions of Law (December 12, 2006) (“RLI-PFFCL”), ¶ 37.

Therefore, Congress created an exemption from such unapproved deductions, for copyright owners and performers who designated an agent other than SoundExchange.<sup>12</sup>

10. SoundExchange's "bootstrap" (from responsibility for payments to a small subset of copyright owners and performers to justification for a national monopoly) eviscerates the intent and clear meaning of Sections 114(g)(3). This is wrong. Under the SoundExchange (national monopoly) approach, there would be no practical way to invoke the exemption, since there would be no competing "Designated Agent" in the market -- thus, the exemption created by Congress would be meaningless -- the exemption from unapproved cost deductions only makes sense in a marketplace where there are at least two competing Designated Agents with DARPA.

**IV. SOUNDEXCHANGE CANNOT BOOTSTRAP THE LIBRARIAN'S RATIONALE IN WEBCASTER I, FOR PAYMENT TO UNAFFILIATED ROYALTY RECIPIENTS, INTO A REQUIREMENT THAT ALL COPYRIGHT OWNERS AND PERFORMERS PAY FOR A LITIGATION OR REGULATORY AGENDA THAT THEY DO NOT SUPPORT**

11. Moreover, the rationale underlying the Librarian's designation of SoundExchange to administer payments to unaffiliated royalty recipients (and its current statutory authority to deduct a broad range of costs) cannot be bootstrapped, as SoundExchange attempts to do,<sup>13</sup> into a requirement that all copyright owners and performers be required to pay for a litigation or regulatory agenda that is not supported by informed copyright owners or performers (Section 114(g)(3) -- simply does not allow that). For example, SoundExchange's proposal that the CRB adopt the "highest" rate, could be detrimental to performers. The highest rate (as opposed to the rate that maximizes the number of distributors and the total royalty pool) might force the Services

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<sup>12</sup> The only other agent operating at time this legislation was debated and enacted was RLI.



to seek rate reductions in voluntary licenses with the record labels.<sup>14</sup> The labels could then apply license fees to costs they are allowed to recoup under artists' recording agreements (but not under the statutory license) – which could unfairly reduce royalties to performers that, under the statutory license, would have been paid to them without deduction of copyright owner costs.<sup>15</sup> Additionally, the high number of voluntary licenses required might lead the Services to rely predominantly on major label sound recordings, thereby limiting the opportunity to program sound recordings created by emerging artists and independent record labels.<sup>16</sup> Mr. Paterno stated that avoidance of costs related to SoundExchange's litigation or regulatory agenda was not "free riding," and rightly questioned why his clients should have to pay for a regulatory agenda or to establish rates that are neither helpful, good nor best for his clients.<sup>17</sup> As Mr. Gertz further confirmed, RLI would consider sharing costs in future proceedings (after RLI has been designated to collect and distribute royalties) if the interests of the RLI Affiliates and the RIAA member companies are aligned.<sup>18</sup>

## **V. SOUNDEXCHANGE CANNOT BOOTSTRAP THE LIBRARIAN'S DECISIONS IN PES I OR PES II INTO A NATIONAL MONOPOLY**

12. The Librarian has explained that the reasoning for RIAA's appointment in PES I was to address the fact that Section 114 appeared to require that the Services "pay the statutory royalties directly to each Copyright Owner." The Librarian recognized certain practical difficulties for the services to "identify, locate and pay each individual

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<sup>13</sup> SX-PFFCL ¶ 1587.

<sup>14</sup> Gertz Tr. Vol. 18, at 301:10 – 303:5.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Paterno Tr. Vol. 41, at 188:2-190:9.

<sup>18</sup> Gertz Tr. Vol. 18, at 300:5-301:3.

Copyright Owner whose works it performed.”<sup>19</sup> The RIAA was appointed because no other party with the capability to collectively administer the licenses came forward then, and RLI did not exist.

13. While this conclusion may have seemed logical in the early days of the statutory license (over ten years ago) it is not a rationale to impose a national monopoly on all royalty recipients today. It is simply no longer difficult for a Service to identify and pay copyright owners and performers since 1) Services may themselves designate common agents to determine the proportionate share of royalties due copyright owners and performers, 2) the Services in this proceeding have not objected to both RLI and SX as Designated Agents (and DiMA has agreed to this), and 3) RLI has agreed to invoice Services directly for their proportionate share of royalties due.<sup>20</sup> SoundExchange cannot use as a rationale for its national monopoly, a temporary solution whose time has passed.

14. In PES II,<sup>21</sup> which dealt with standing issues, the Register of Copyrights nevertheless opened the door to competition and avoidance of SoundExchange cost deductions, notwithstanding the fact that RLI lacked Designated Agent status, by stating:

- “In fact, it is not clear that RLI needs to participate in a CARP proceeding or be named in a negotiated settlement in order to act as a designated agent for purposes of collecting royalty fees on behalf of copyright owners and performers who are entitled to receive funds collected pursuant to the section 112 and section 114 licenses.”<sup>22</sup>
- “Section 112(e)(2) and section 114(e) of the Copyright Act both expressly provide that a copyright owner of a sound recording may designate common agents to negotiate, agree to, pay, or receive royalty payments.”<sup>23</sup>

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<sup>19</sup> See, RLI-PFFCL ¶ 15.

<sup>20</sup> Id. (Footnote 4).

<sup>21</sup> See, RLI-PFFCL ¶ 45.

<sup>22</sup> RLI Exhibit 4 at 39840.

<sup>23</sup> Id.

- “Under these provisions, it is plausible that a copyright owner or performer could designate any agent of his or her choosing (including RLI)--whether or not that agent had been formally designated in the CARP proceeding-to receive royalties from the licensing of digital transmissions and, by doing so, limit the costs of such agents to those specified in section 114(g)(4), as amended by the Small Webcaster Settlement Act of 2002.”<sup>24</sup>

This does not, as SoundExchange argues, support a national monopoly.

## **VI. DARPA WILL ADDRESS THE VAST MAJORITY OF SOUNDEXCHANGE’S UNSUPPORTED CLAIMS OF POTENTIAL CONFUSION, DISPUTE, COST OR DELAY**

### **A SoundExchange Presented No Credible Evidence Attacking The Benefits Of DARPA**

15. The record indicates that other than its general objection to competition with RLI, SoundExchange did not mount any credible objection to the elements of DARPA – it only objected generally to the previous two-tier structure which neither SoundExchange nor RLI currently support. DARPA addresses the vast majority of SoundExchange’s unsupported claims of potential of confusion, dispute, cost or delay.<sup>25</sup>

### **B. DARPA is Better Than The Previous Two-tier System**

16. First, as stated in RLI’s PFFCL ¶ 90, under DARPA, each Designated Agent receives all of the information necessary to calculate and distribute royalties to its affiliates (i.e., statements of account and records of use) directly from licensees, without interaction with any other Designated Agent.

17. Second, DARPA allows for the allocation of license fees among the Designated Agents, based on each Designated Agents’ proportionate share of sound recording performances, made by each licensee based on such records of use. RLI’s proposed regulations regarding the allocation of fees among Designated Agents (RLI-

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<sup>24</sup> Id.

PFFCL ¶ 117) clearly detail the formula for determining proportionate share. RLI is better at identifying the ownership of sound recordings from Services records of use, than the Services themselves, and RLI has computer software and databases that perform that function.<sup>26</sup> RLI's proposed regulations covering payment for the first accounting periods, wherein RLI has proposed an initial 5% proportionate share<sup>27</sup> contains a true up to the actual proportionate share with a refund for overpayments, if any, to adjust to the actual proportionate share for such periods.<sup>28</sup>

18. Third, each Designated Agent may then - independently of the other Designated Agent - establish its own distribution policies, consistent with the payout formula required by the statute, and its own administrative fee structure according to the marketplace demands of its respective affiliates. DARPA allows each Designated Agent to directly receive payment for its affiliates' proportionate share of sound recording performances (i.e., each Designated Agent collects its own money!). Therefore, distribution policy and fee issues will be resolved between a Designated Agent and its affiliates – not between the Designated Agents.<sup>29</sup>

19. Fourth, audits of Services will be simplified as DARPA allows each Designated Agent to separately audit a service, for its own affiliates, thus eliminating any conflict among the Designated Agents as to audit expenses or settlements. It is significant to note that SoundExchange itself conceded this point as it has requested a term that

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<sup>25</sup> SX-PFFCL ¶¶ 1545-6,1548,1553,1554,1556,1582.

<sup>26</sup> Gertz Tr. Vol. 18, 241:6-242:4.

<sup>27</sup> See, RLI-PFFCL ¶ 117 (Proposed term § 262.4(g)(3)).

<sup>28</sup> Gertz Tr. Vol. 41, at 148:12 – 149:13.

<sup>29</sup> Gertz Written Dir. ¶ 43; Gertz Tr. Vol. 18, page 86:2-19.

would allow any individual copyright owner or performer to audit a Service if SoundExchange, "for its own business reasons" does not conduct an audit.<sup>30</sup>

20. Last, as explained in the RLI-PFFCL, the CRB, like the Librarian in Webcaster I, has the authority to adopt a term to mediate allocation disputes, if any.<sup>31</sup>

**C. Competition is Better Suited to Resolving Distribution Policy Issues than Detailed Regulation**

21. SoundExchange seeks findings that competition is inefficient and will require this Board to promulgate "an enormously detailed set of regulations" regarding matters of distribution policy that are not addressed by the statute.<sup>32</sup> It is true that different collectives could interpret the statute differently and implement different distribution policies. This is a good thing, and DARPA minimizes disputes among the collectives by making matters of distribution policy internal to each Designated Agent and its affiliates. In the analogous marketplace for the administration of performance rights in musical works, the U.S. Department of Justice, facing this same issue, decided to forgo detailed regulation and oversight of ASCAP's distribution rules in favor of competition among collectives ("...the United States believes that competition will provide a better check on unfair practices than regulation, so long as songwriters are able to move freely among PRO's").<sup>33</sup>

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<sup>30</sup> Kessler Written Dir. page 36.

<sup>31</sup> RLI-PFFCL ¶ 91.

<sup>32</sup> SX-PFFCL ¶¶ 1548 – 1552.

<sup>33</sup> Gertz Tr. Vol 41, at 141:11-18.

**VII. AFM MEMBERS ARE UNAWARE OF COMPETITIVE ALTERNATIVES TO SOUNDEXCHANGE AND, IN ANY EVENT, THE AFM DOES NOT REPRESENT THE VIEWS OF SIGNIFICANT ARTISTS**

22. SoundExchange relies on the testimony of one of its founding Board members, Thomas Lee, on behalf of the AFM union, for its position that artists favor SoundExchange as the sole monopolistic collective here. But Mr. Lee admitted that his union members do not even know about RLI.<sup>34</sup> The only record evidence of the views of AFM members on multiple collectives is Mr. Lee's admission that his union members, given the choice, have affiliated with multiple PROs, some with ASCAP, BMI and SESAC. Mr. Lee's statement that his union members favor a single collective or that they have any point of view concerning RLI (when they have never even been told that RLI exists) should be given little, if any, weight.

23. In addition, neither the AFM, nor the other union with representatives on the SoundExchange Board, AFTRA, represent the interests of Mr. Paterno's clients who include several well-known superstar artists (including RLI affiliate Metallica). While the unions may represent session musicians and musicians that "play bar mitzvahs on weekends, they do not speak for anyone who is a celebrity artist or famous artists, artists that sell a lot of records."<sup>35</sup>

24. Mr. Paterno was the only witness in the proceeding that represented the views of artists selling a lot of records and it was his view that competition is necessary here to ensure fairness and efficiency in the collection and distribution of royalties

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<sup>34</sup> Lee Tr. Vol. 45 at 259.

<sup>35</sup> Paterno Tr. Vol. 41, at 172.

payable under the Statutory License.<sup>36</sup> SoundExchange's other designated artist witnesses (Cathy Fink and Jonatha Brooke) do not sell a lot of records.<sup>37</sup>

### **VIII. WHETHER A COLLECTIVE IS FOR PROFIT OR NOT, IS IRRELEVANT TO THIS BOARD'S DETERMINATION**

25. SoundExchange suggest that this Board should favor a SoundExchange monopoly because RLI is now a for profit entity and thus not qualified to act as a Designated Agent here. In the context of the PRO model, which is a relevant benchmark for this Board to consider here, BMI (created by broadcasters with an all broadcaster Board of Directors) and SESAC are for profit entities and ASCAP is not for profit.<sup>38</sup> The form of organization is of no consequence to the PRO affiliates – they determine who to affiliate with based on net royalty distribution and not on the basis of the form of corporate organization.<sup>39</sup> Similarly, here, in the exercise of freedom of choice, artists will weigh all factors, including corporate ownership, and “make an informed decision as to who they believe will best provide fair, prompt and efficient distribution of royalties.”<sup>40</sup>

The non profit/for profit distinction is meaningless to Mr. Paterno and his superstar clients who will choose their collective based on whoever pays the most.<sup>41</sup> It is the royalty recipients who need to weigh this factor, if at all, and the CRB should not preclude RLI from serving as a Designated Agent on the basis of its corporate status.

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<sup>36</sup> Paterno Written Dir. ¶ 2-8.

<sup>37</sup> See, Fink Tr. Vol. 11, at 11-12; Brooke Tr. Vol. 11, at 5.

<sup>38</sup> Gertz Tr. Vol. 41, at 23.

<sup>39</sup> Gertz Tr. Vol. 41, at 24.

<sup>40</sup> Gertz Tr. Vol. 41, at 25.

**IX. CONTRARY TO SOUNDEXCHANGE'S ASSERTIONS, MR. GERTZ' TESTIMONY SUPPORTS THE FOLLOWING PFFCLS AND NOT CONTRARY FINDINGS**

26. Without record evidence to support many of their proposed findings of fact, SoundExchange instead repeatedly cites to Mr. Gertz' testimony out of context or in an improper fashion, in an attempt to craft proposed findings of fact to preserve its monopoly. The CRB should be very careful in their citation of Mr. Gertz' testimony to support any of SoundExchange's Proposed Facts in light of this sloppy and improper tactic. The most glaring examples of this tactic are citations to Mr. Gertz attempting to contradict the following factual points, which are also established in RLI's Proposed Findings Of Fact:

**A. The PROs Are A Benchmark For Competition Under These Statutory Licenses**

27. In SXPFFCL 1572, SoundExchange cites Mr. Gertz<sup>42</sup> for the proposition that the "PROs spend more money on marketing and the duplication of systems than is efficient". But in that testimony, Mr. Gertz actually cited the relevant PRO example to support his testimony that SoundExchange could be similarly inefficient in the absence of competitive pressures and that competitive pressures would limit SoundExchange from being inefficient<sup>43</sup>

**B. Advances Are A Healthy Marketplace Incentive Available To Attract Members**

28. In SXPFFCL 1594, SoundExchange, totally unable to elicit the testimony they sought from Mr. Gertz in cross-examination, instead, generally cited to Mr. Gertz' rebuttal to support a proposed finding that RLI intends to use its proposed designated

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<sup>41</sup> Paterno Tr. Vol. 41 at 196.

<sup>42</sup> Gertz Tr. Vol. 41, at 128,



agent status to “lure” certain owners and performers into “business deals”.<sup>44</sup> In fact, Mr. Gertz’ answered “no” to Mr. Smith’s question in this regard,<sup>45</sup> and again when Mr. Smith badgered him further, Gertz said “I wouldn’t characterize it that way”.<sup>46</sup> In fact, Mr. Gertz further testified that he was not “luring” anyone with advances “because there are a panoply of services that we think recipients will want in this marketplace....”<sup>47</sup> In a competitive marketplace, certain artists might receive greater advances simply because they are more popular and have more expected performances. This is not preferential treatment but marketplace economics at work – an advance is merely a present value discounted cash flow.<sup>48</sup> Furthermore, nowhere in the statute is a copyright owner or performer precluded from seeking or taking an advance or contracting with an agent to administer additional rights or provide additional services.

**C. RLI Intends To Treat Its Members Fairly And Offer Advances As Appropriate**

29. SXPFFCL 1623 – SoundExchange totally mischaracterizes Mr. Gertz’ testimony by suggesting a finding that “RLI’s business model is not premised on retaining clients, but rather wringing as much profit as possible from the wealthier clients, using designated status as a vehicle to propagate its non-statutory profit-making schemes.”<sup>49</sup> This is not consistent with what Mr. Gertz testified to at all. What he did say in response to Mr. Smith’s cross was that RLI “intends to treat everyone fairly and everybody’s getting what they are due under the statutory license.”<sup>50</sup> As Mr. Gertz also

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<sup>43</sup> Gertz Tr. Vol. 41, at 126-8.

<sup>44</sup> Gertz Tr. Vol. 41, at 80-88.

<sup>45</sup> Gertz Tr. Vol. 41, at 85:3-7.

<sup>46</sup> Gertz Tr. Vol. 41, at 87:11-18.

<sup>47</sup> Gertz Tr. Vol. 41, at 87:21-88:7.

<sup>48</sup> Gertz Tr., Vol. 41, at 80:7-19.

<sup>49</sup> Quoting Gertz Tr. Vol. 41, at 91.

<sup>50</sup> Gertz Tr. Vol. 41, at 94:11-20.

testified, "ASCAP and BMI offer advances to compete openly for members in a competitive market. And that's what we are saying should happen here."<sup>51</sup>

SoundExchange misleads this Board by failing to point out that Mr. Gertz later testified, again in response to a failed attempt at cross-examination, that "performances would be valued equally by a designated agent."<sup>52</sup>

**D. Market Forces Will Limit Both SoundExchange and RLI From Taking Excessive Cost Deductions**

30. In SXPFFCL 1629, SoundExchange misquotes Mr. Gertz again to support a proposed finding that SoundExchange only pays money to royalty recipients and its employees. What Mr. Gertz really told Mr. Smith here was that "in general with collectives, whether they're profit or not profit, doesn't mean there isn't some excess that goes someplace. SoundExchange has decided to pay back the RIAA's costs on certain things. ASCAP has big parties every year that artists pay for. . . expenses can be hidden in all kinds of places. . . and in my experience, a competitive market limits collectives from doing those kinds of things."<sup>53</sup> SoundExchange, like RLI, has a motive to generate net revenue, but is limited from doing so by the same competitive market pressures that limit RLI.

**E. In a Competitive Environment RLI and SoundExchange Will Compete On The Basis Of Maximizing Distributions To Royalty Recipients**

31. In SXPFFCL 1631, SoundExchange seeks a finding that "RLI seeks to maximize its own profits rather than those of the music licensors" – based on Mr. Gertz'

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<sup>51</sup> Gertz Tr. Vol. 41, at 94:6-10.

<sup>52</sup> Gertz Tr., Vol. 41, at 95-06.

<sup>53</sup> Gertz Tr. Vol. 41 at 126-127.

statement, out of context, that he "wants to make money".<sup>54</sup> This statement only has meaning in the context of Mr. Gertz' further statement that he will only make money if he charges a lower administrative fee than SoundExchange and still pays the members on a basis that will attract them (in a competitive environment).<sup>55</sup> As Mr. Paterno stated: "I believe that profit motivated companies tend to make more money for their for either shareholders or members than others . . . in the long run they will be motivated to pay my clients more money. And like I said, if I'm wrong, I'm with [SoundExchange]".<sup>56</sup> In a competitive world, both SoundExchange and RLI can be expected to generate net revenues, but in the competitive world, that Mr. Paterno believes is fair in the statutory license environment, the members will go to "whoever pays them the most."<sup>57</sup>

**X. SOUNDEXCHANGE'S *AD HOMINEM* ATTACKS ON RONALD GERTZ' CREDIBILITY ARE MEAN-SPIRITED AND SHOULD BE DISREGARDED BY THIS BOARD**

32. In a desperate attempt to support its request for a monopoly and to discredit Ronald Gertz, RLI's President, and its key witness in these proceedings, SoundExchange resorts to improper *ad hominem* attacks on Mr. Gertz. SoundExchange's proposed findings<sup>58</sup>, in this regard, are based on presentation of disingenuously carved portions of transcript (none of which concern the important and substantive testimony that Mr. Gertz gave in this proceeding) which are, as is SoundExchange's penchant, taken out of context. The Board should entirely disregard these mean-spirited attacks and rule instead based on the record evidence presented, in good faith, by SoundExchange and RLI.

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<sup>54</sup> Gertz Tr. Vol. 41 at 89.

<sup>55</sup> Gertz Tr. Vol. 41, at 89-94.

<sup>56</sup> Paterno Tr. Vol. 41, at 187:10-188:1.

<sup>57</sup> Paterno Tr. Vol. 41, at 196.

33. Ronald Gertz, the President of RLI, is an attorney, and has more experience in the music licensing field than any other witness presented by any of the parties in this proceeding. His thirty years of music licensing experience and the tens of thousands of music licensing transactions that he has overseen, plus the fact that he has been an expert in ASCAP rate court proceedings establishing rates for compulsory licenses for the PROs, makes him the most knowledgeable and credible witness in the field on the subject of collective licensing.<sup>59</sup>

34. Under Mr. Gertz' leadership, his company MRI, has created a data processing platform that can analyze volumes of music use data to determine how much music is allocated between, for example, the three PROs (i.e., ASCAP, BMI and SESAC) — the same type of system that RLI proposes to enact here to administer this statutory license - and to determine, after submission of usage reports from the Services, the allocation of payments between RLI and SoundExchange.<sup>60</sup> MRI's systems, and the institutional knowledge which Mr. Gertz has about them, are similar to the systems that SoundExchange has created but Mr. Gertz has more experience with these systems than any SoundExchange witness presented here.<sup>61</sup>

## **XI. ADDITIONAL CONCLUSIONS**

35. Sections 112(e)(2) and 114(e)(1) give any copyright owner the right to designate common agents, on a non-exclusive basis, to negotiate, agree to, pay, or receive statutory license royalty payments.

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<sup>58</sup> SX-PFFCL ¶¶ 1643 - 1648

<sup>59</sup> Gertz Tr. Vol.18, at 9:7-17:4.

<sup>60</sup> Gertz Tr. Vol 18, at 21-22.

<sup>61</sup> Gertz Tr. Vol.18, at 23-24.

36. Section 114(g)(3) gives any copyright owner or performer the right to designate an agent, other than SoundExchange, for the purpose of performing the functions detailed in Sections 112(e)(2) and 114(e)(1) and the express purpose of avoiding unapproved cost deductions by a non-profit agent.

37. Section 114(g)(4) specifically allows a for profit agent to perform the functions detailed in Sections 112(e)(2) and 114(e)(1), and deduct costs identified in Section 114(g)(3) from royalties payable to copyright owners and performers who have entered into a contractual relationship with such agent that specifies that such costs may be deducted from statutory royalty payments.

38. Sections 112 and 114 contain no statutory authority to impose a national monopoly on copyright owners and performers who seek competition in collective licensing services.

39. The willing buyer/willing seller standard does not apply to disputes solely among willing sellers. In the alternative, if the willing buyer/willing seller standard does apply, the record indicates that willing buyers and willing sellers prefer competition, instead of a national monopoly, as the best way to make prompt, fair and efficient payment to Copyright Owners and Performers with a minimum of expense.

40. The CRB grants Designated Agent status, with DARPA, to both RLI and SoundExchange because the record evidence establishes that both organizations are qualified to perform the functions of a Designated Agent and further establishes that

competition would enable a more fair, prompt and efficient administration of the statutory license than a national monopoly.

Respectfully submitted,

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December 15, 2006

CERTIFICATE OF SERVICE

I, Carol Reush, hereby certify that a copy of the foregoing Royalty Logic, Inc.'s Reply. to SoundExchange's Proposed Findings of Fact and Conclusions of Law has been served on this 15<sup>th</sup> day of December, 2006 by email and overnight mail to the following persons.

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